No. 89-630

In The

Supreme Court of the United States

October Term, 1989

THE CITY OF KILGORE, TEXAS,

Petitioner,

vs.

GARY D. MOORE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MR. MICHAEL M. DANIEL
MICHAEL M. DANIEL, P.C.
3301 Elm Street
Dallas, Texas 75226-1637
214-939-9230

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT'S STATEMENT OF THE CASE

Respondent disagrees with Petitioner's Statement of the Case insofar as on page 6 it states that an agreement to limit speech had been made and that Moore's statements to the press included factual misstatements, recklessly drawn conclusions, and false implications. The per curiam opinion of the Court of Appeals accurately states the facts of the case. The city manager suggested that Moore limit his response to an expression of sympathy for the family of his deceased colleague [Petition page A-6]. The City made no showing that Moore made false statements of fact with either knowledge of their falsity or with reckless disregard of their truth or falsity [Petition page A-29].

SUMMARY OF ARGUMENT

The cases cited by petitioner in support of its argument on conflicting Court of Appeals decisions are not in conflict with the decision in this case but rather involve the application of the same rules of decision to different fact situations.

The petition does not show that either the factual or legal prerequisites exist to support a holding that Moore waived his First Amendment rights through some form of agreement.

The existing U.S. Supreme Court precedent on the burden of proof and standard of appellate review in First Amendment cases reflects the unique value given to free speech in our laws and practices. The precedents serve to further that value. The petitioner's request to change the

precedent gives no weight to the value and should not be considered persuasive.

ARGUMENT

I. The decision below does not conflict with the decisions of other Courts of Appeals

All of the circuits clearly recognize and follow the balancing test laid out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). The Fifth Circuit explicitly recognized and followed the same balancing test in this case.

In reviewing the speech to see if it is of public concern, *Fiorillo* states that the nature of the whole communication must be examined. *Fiorillo v. U.S. Department of Justice*, 795 F.2d 1544 (Fed. Cir. 1986). The Fifth Circuit did just that by looking at the entire record and examining the context of Mr. Moore's speech. The Fifth Circuit took into account all of the surrounding circumstances thus conforming to the requirement laid out in *Fiorillo*.

Petitioner must imply a new rule into *McGurran v. Veterans Administration*, 665 F.2d 321 (10th Cir. 1981), in order to argue conflict in the appellate courts. In *McGurran*, the court applied the balancing test and found that the interest in having the employees work outweighed the expression of posting signs all over the plant. Simply because the balancing test favored the employer in this case does not present a split of authority. A written contract existed in *McGurran* and the Tenth Circuit weighed the interests and held accordingly.

In the present case, the prior agreement, if any, was both oral and disputed, yet the Fifth Circuit weighed it as a factor in the balancing test when considering the interest of the employer in promoting efficient public services. The Fifth Circuit properly balanced that with the employee's interest and noted that "efficiency is not an end-all and be-all goal of democracy. Speech among the people helps to maintain the vitality of self-government." *Moore v. City of Kilgore.* Furthermore, the court stated that "discipline for more abstract and attenuated management purposes that do not relate to the actual fighting of fires – the primary purpose of the Fire Department – is an interest of lesser magnitude." *Id.*

Nowhere in *McGurran* does it expressly state petitioner's proposition that one may unknowingly contract away First Amendment rights. Whether or not the City of Kilgore and Mr. Moore agreed on what he would say is irrelevant to the issue of the City penalizing Mr. Moore for protected speech.

Petitioner also mistakenly argues that the Fifth Circuit differs from the holding in *Kotwica v. City of Tucson,* 801 F.2d 1182 (9th Cir. 1986). *Kotwica* merely held that an official speaker may not purposely misstate the official policy of the government employee. However, the Ninth Circuit in *Kotwica* explained that the employee can comment whether or not her opinion would sit well with the employer. *Id.* It is evident from all the facts that Mr. Moore did not misappropriate a position as a government spokesperson to misstate government policy. Moore was not a chosen government spokesperson. The City had its own representative at the press conference to give the

City's position on the fire and the surrounding circumstances. Moore was not misstating official policy. The policy mandating layoffs was not in dispute. Moore was disagreeing with the policy.

Moreover, the Fifth Circuit took into account the interest of the City in controlling information about its policy and explained that "the City's interest in an 'accurate' flow of information is not absolute and does not enjoy durational eternity." *Moore v. City of Kilgore*. In light of the arena in which the statements were made, which was a press conference where the City had ample opportunity to discuss official policy, it can be seen that the Fifth Circuit did not vary from *Kotwica*.

II. There was no "agreement" to limit speech that complied with constitutional requirements

One cannot be deprived of constitutional rights unless the right or privilege was knowingly waived. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143-146 (1967). Moreover, waivers of First Amendment rights are to be inferred only in "clear and compelling" circumstances. *In re Halkin*, 598 F.2d 176, 189 (D.C. Cir. 1979). *See generally Grandbouche v. Clancy*, 825 F.2d 1463, 1467 (10th Cir. 1987) (one cannot waive First Amendment rights merely by bringing suit); *Ostlund v. Bobt*, 825 F.2d 1371, 1373 (9th Cir. 1987) (waiver of constitutional rights must be voluntary and done knowingly; *Okeson v. Tolley School Dist.*, 760 F.2d 864, 868 (8th Cir. 1987), *rev'd on other grounds*, 766 F.2d 378 (8th Cir. 1987) (there is a presumption against waiver of a constitutional right and if waived, it must be a voluntary, intentional relinquishment or abandonment

of that privilege; acts proving waiver should be so manifestly consistent with intent to waive that there is no other reasonable explanation for the conduct).

The "clear and compelling" circumstances required for waiver of First Amendment rights are lacking here.

Mr. Moore's brief exchange with the City Manager in the absence of counsel hardly calls to mind the negotiations necessary to waive a most important right. The circumstances surrounding the chat with the City Manager make it evident that a contract did not even arise. There can be no breach if a contract never comes into being.

III. Existing precedent on the Standard of review and burden of proof in First Amendment cases has not been shown to require re-examination

The Fifth Circuit examined the entire record and found that Mr. Moore was entitled to correct determinations of law. The Fifth Circuit took into account the findings of the District Court in weighing the interests at stake and gave those findings proper weight.

In *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977), this Court held that the burden rested on the public employee to demonstrate that his conduct was constitutionally protected and that the protected behavior was a "substantial factor" in the employer's subsequent actions. Once this is done, the employer must show by a preponderance of the evidence that the same actions would have been taken in the absence of protected conduct. *Id.* at 287.

In the case at hand, Mr. Moore met his burden of showing that his speech was constitutionally protected. It is also evident that the City did not meet its burden of showing that Mr. Moore's punishment would have taken place in the absence of this protected speech. The newspaper article attached to the disciplinary memorandum makes it all too clear that Mr. Moore was penalized for exercising his First Amendment rights.

The *Mount Healthy* test correctly states the burden of proof that is consistent with other civil rights cases, for it has the plaintiff bear the burden of showing that the speech was constitutionally protected and that the speech was the cause of the discipline or discharge. The only burden put upon the defendant is that it must prove the affirmative defense that the employee would have been discharged even absent the protected activity. A defendant has no burden until the plaintiff has proven his case.

In this case, the City has not ever suggested that it even had a non-speech related reason for disciplining Mr. Moore. A change in the burden would not affect the outcome of this case.

CONCLUSION

Respondent urges the Court to deny the petition.

Respectfully Submitted,

MICHAEL M. DANIEL
MICHAEL M. DANIEL, P.C.
3301 Elm Street
Dallas, Texas 75226-1637
214-939-9230

Attorney for Respondent